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No. 00-63

FILED

AUG 9 2000

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IN THE

Supreme Court of the United States

ANTHONY C. AYERS, ERNEST R. KING, DENSHIA MOORE, JOSEPH C. WILLIAMS, MAELISSA R.M. WATSON,
Petitioners,

v.

OIL, CHEMICAL & ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

PATRICK M. FLYNN
1235 North Loop West, Suite 1235
Houston, Texas 77008
(713) 861-6163
Counsel of Record for Respondent Oil, Chemical & Atomic Workers International Union, AFL-CIO

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28 pp

QUESTIONS PRESENTED

I. Whether Petitioners generalized complaints about the judicial system, the trial of this cause and other proceedings in this case form a basis for granting a writ of certiorari, or otherwise show that Petitioners were denied due process.

II. Whether the Court of Appeals was correct in upholding the district court's ruling granting partial summary judgment which found that the Respondent did not breach the duty of fair representation by withdrawing unfair labor practice charges involving Petitioners.

III. Whether the default judgment in this matter was correctly set aside, because service of process on the Respondent was not accomplished.

IV. Whether the Petition should be denied because the sanctions assessed were justified in this case.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Oil, Chemical & Atomic Workers International Union, AFL-CIO, oppose Petitioners Anthony C. Ayers's, Ernest R. King's, Denshia Moore's, Joseph C. Williams's and Maelissa R.M. Watson's Petition for Writ of Certiorari, as follows:

STATEMENT OF THE CASE

A. Statement Of Pertinent Facts.

Petitioners Ayers, King, Moore and Williams (collectively "Petitioners") are former production line employees of Ashland Chemical, Inc., ("Ashland") at Ashland's Dallas, Texas, facility. (Tr. at 5, 54, 104, 148).[1]

Petitioners were all discharged by Ashland between October of 1994 and January of 1995, during a union organizing drive. (Tr. at 5, 56, 121, 156). On or about 20 December 1994, Respondent Oil, Chemical & Atomic Workers International Union, AFL-CIO ("Respondent" or "Union") through its International Representative, John Dykes—filed Unfair Labor Practice charges with the National Labor Relations Board (NLRB), alleging that the discharge of Petititioners by Ashland was because of

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[1] Citations to Volumes 1-3 of the Record on Appeal, all consecutively paginated, are indicated thus: "([Vol.]R. at ___)." Citations to the Envelope of Exhibits, (containing the Motion for Summary Judgment, the Response and Reply, and the Exhibits thereto), paginated with Volumes 1-3 of the Record on Appeal, are indicated thus: "(E.E.R. at ___)." Citations to Volume 4 of the Record on Appeal (the trial transcript), which is separately paginated, are indicated thus: "(Tr. at ___)." Citations to the Supplemental Record, Volume 1, which is separately paginated, are indicated thus: "(S.R. at ____)." Finally, citations to the Supplemental Record, Volume 2 (the Rule 60 and Motion for Sanctions Hearing Transcript), separately paginated, are indicated thus: "(S. Tr. at ___)."

their support for the Union. (Tr. at 191, 197, 213; 1R. at 003, 245, E.E.R.at 636, 642).

The NLRB investigated the ULP charges and, at the investigation's conclusion, dismissed the charges against Ashland. (E.E.R. at 629, 636, 642). The NLRB determined, *inter alia,* that there was no evidence that the Petitioners received unlawful treatment by Ashland management because of their support of the Union. (E.E.R. at 629, 636, 642).[2] The NLRB dismissals occurred on 3 and 4 May 1995. (E.E.R. at 634, 639).

Meanwhile, during this same period, the Union and Ashland were engaged in negotiating their first collective bargaining agreement (CBA). (E.E.R. at 629). On or about 11 May 1995, the Union and Ashland reached tentative agreement on a contract. (E.E.R. at 630, 645). The tentative agreement provided, among other things, that the Union would withdraw all pending ULP charges, including those involving Petitioners. (E.E.R. at 630, 646). Jimmy Roan, the Union's International Representative, who had been conducting the Union's contract negotiations since March 1995, recommended acceptance of the Company's proposals. (E.E.R. at 630). Mr. Roan believed that the chances of getting the NLRB's General Counsel to reverse the Regional Director, and reinstate the ULP charges were slim. (E.E.R. at 630). Acceptance of the Ashland proposals would include not appealing the charges involving the Petitioners, and withdrawing some other charges that did not involve Petitioners. (E.E.R. at 630). Mr. Roan believed that acceptance of Ashland's proposals was in the best interest of the bargaining unit as a whole. (E.E.R. at 630).

The Union Negotiating Committee agreed with Mr. Roan's recommendations. (E.E.R. at 630). The membership was in-

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[2] According to the NLRB, the evidence also showed that Petitioner Williams was a supervisor, and thus not entitled to the protection of the Act. (E.E.R. at 642).

formed of the details of Ashland's proposal, and voted to ratify the proposed contract, which went into effect as of 11 May 1995. (E.E.R. at 630). The charges were withdrawn and this suit ultimately ensued (1R. at 004).

The District Court granted Summary Judgment as to the portion of Petitioners' claims that alleged that the Union had breached the duty of fair representation by withdrawing the NLRB charges.(2R. at 249-53) The remainder of Petitioners' claims were tried to a jury, and rejected by a unanimous verdict. (3R. at 374, 379, 381)

Following the jury verdict, Petitioners' new counsel, Petitioner Maelissa R.M. Watson, ("Petitioner Watson") filed a "Motion and Brief for Relief Under Final Judgment" under FED. R. CIV. P. 60. Petitioners' Rule 60 Motion was denied as baseless, and sanctions assessed against Petitioner Watson. (S.R. at 0001).

B. Pertinent Procedural Facts.

Petitioners filed this action in the United States District Court for the Northern District of Texas, Dallas Division, on or about 17 November 1995. (1R. at 001). The Petitioners complained of a breach of the Duty of Fair Representation (DFR) by Respondent, in violation of of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185. (1R. at 001-005).

A default judgment was granted on 23 May 1996. (1R. at 027-028). Upon learning of the Judgment, the Union filed its Motion to Set Aside Default Judgment on 15 July 1997 (1R. at 029-032).

Magistrate Judge Sanderson entered his Report and Recommendation recommending that the Default Judgment should be set aside on 13 April 1998. (1R at 158-160). Petitioners filed an Objection to the Magistrate Judge's Report on 24 April 1998. (1R. at 161). The district court adopted the Magistrate Judge's

Report and Recommendation that the default judgment be set aside by an Order dated 28 April 1998. (1R. at 166).

Petitioners filed a Motion for Rehearing on the default judgment issue on 7 May 1998. (2R. at 167). The Magistrate Judge recommended that the Motion be denied by his Report and Recommendation of 26 May 1998. (2R. at 172, 176-82, 183-85). Petitioners filed their Objection to the Report of the Magistrate on 5 June 1998. (2R. at 186, 198). The district court overruled the objections and adopted the report by its Order of 24 June 1998. (2R. at 205-06).

Meanwhile, on 8 May 1998, the Union had filed its Answer to Petitioners' Original Complaint. (2R. at 173-75). The Union's Answer denied Petitioners' allegations, and raised the affirmative defense that Petitioners had failed to state a claim upon which relief could be granted. (2R. at 173-75).

The Union then submitted a Motion for Summary Judgment, contending, *inter alia*, that Petitioners could show no DFR breach. (E.E.R. at 590-600). The district court entered its Memorandum Opinion and Order, entered Summary Judgment against Petitioners on its claims that the Union had breached the DFR in withdrawing certain NLRB charges involving Petitioners, but holding that Petitioners retained a viable cause of action on the issue of whether the Union had sufficiently represented them before the NLRB. (2R. at 244-53).

Trial by jury on Petitioners' extant claims was held on 8-9 March 1999. (Tr. at 1, 3). The jury unanimously found in favor of the Union. (3R. at 374). A Final Judgment was entered by the district court in favor of the Union on 9 March 1999. (3R. at 381). Petitioners trial counsel, Eugene Z. DuBose, filed Motions to Withdraw and to Substitute Maelissa R.M. Watson, (who sat second chair at the trial), as Counsel on 21 April 1999. (3R. at 417-419). The district court granted these motions by its Order of 23 April 1999. (3R. at 420).

Even prior to the Substitution Order, Petitioners' new counsel, Petitioner Watson, filed a Notice of Appeal on 7 April 1999. (3R. at 390). The Notice of Appeal sought review of the Final Judgment, the earlier partial Summary Judgment, and the Orders setting aside the Default Judgment in favor of Petitioners. (3R. at 390).

That same day (7 April 1990), Petitioners' new counsel filed a "Rule 60 Motion and Brief for Relief Under Final Judgment." ("the Rule 60 Motion") (3R. at 382). The Union filed a Response to Petitioners' Rule 60 Motion on 4 May 1999. (3R. at 425). On 10 May 1999, the Union informed Petitioners' counsel that it intended to file a Motion for Sanctions in the event the Rule 60 Motion was not withdrawn. (3R. at 515-16). The Rule 60 Motion was not withdrawn and the Union filed its Motion for Sanctions on 11 June 1999, contending that Petitioners' Rule 60 Motion was false, unfounded and frivolous. (3R. at 508-527). A hearing before U.S. District Judge Jerry Buchmeyer was held on both the Rule 60 Motion and the Union's Motion for Sanctions on 10 August 1999. (3R. at 528-581, S.R. at 0001, S.Tr. at 1-2). By its Order of 11 August 1999, the district court denied the Rule 60 Motion, granted the Motion for Sanctions, and ordered that Petitioner Watson was barred from ever appearing again before Judge Buchmeyer. (S.R. at 0001-02).

Petitioners filed a "Petitioners' and Petitioners' Counsel's Motion for Reconsideration on Order for Sanctions" on 11 August 1999. (S.R. at 0003-05). The district court denied this motion by its Order of 13 August 1999. (S.R. at 0006-0008). Petitioners filed a second Notice of Appeal of the district court's Order of 11 August 1999, and of the Order denying the Motion for Reconsideration of 13 August 1999. (S.R. at 0013).

The Union moved to consolidate the two appeals. By order dated 29 October 1999, the motion to consolidate was granted.

On 5 May 2000, the Fifth Circuit affirmed the judgment and orders of the district court. (App. at 24-25).[3]

SUMMARY OF THE ARGUMENT

The Petition for writ of certiorari should be denied because the Petition is founded upon generalized complaints of unfairness that do not implicate due process or otherwise show sufficient reason to grant a writ of certiorari. As to the specific manner in which the case was disposed of below, Respondent maintains that the district court correctly set aside the default judgment originally entered in this matter because, among other things, the Petitioners did not properly effect service on the Union, thus failing to afford the Union proper notice of the suit, and did not make a record sufficient to support the default judgment. Also, the Union advanced a meritorious defense.

Further, the district court correctly granted Summary Judgment against the Petitioners as to their claim that the Union had breached the DFR by withdrawing the ULP charges. As the district court's opinion makes clear, the final product of the collective bargaining process may constitute a breach of the DFR only if it can be fairly characterized as so far outside a wide range of reasonableness that it is wholly irrational or arbitrary. The district court correctly found that this was not the case with respect to the Union's decision to withdraw the ULP charges involving the Petitioners.

Finally, Respondent maintains that Petitioners' Rule 60 Motion was baseless and completely unfounded, and constituted sanctionable conduct under Rule 11, for which the district court correctly assessed sanctions. The Fifth Circuit properly upheld the district court's actions, and the jury's verdict, on appeal. Thus, the petition for writ of certiorari should be denied.

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[3] Citations to "(App. at ___)" refer to the pages of the Appendix bound with Petitioners' Petition. Citations to "(Pet. at ___)" refer to Petition.

REASONS WHY THE PETITION SHOULD BE DENIED

I. PETITIONERS GENERALIZED COMPLAINTS ABOUT THE JUDICIAL SYSTEM, THE TRIAL OF THIS CAUSE AND OTHER PROCEEDINGS IN THIS CASE DO NOT FORM A BASIS FOR GRANTING A WRIT OF CERTIORARI, OR OTHERWISE SHOW THAT PETITIONERS WERE DENIED DUE PROCESS.

In large part, the Petition consists of generalized complaints about the courts of this country being in crisis; about the credibility of the judicial system being "seriously questioned by an irate and frustrated public;" the unfairness of Federal Courts in the Northern District of Texas; and how form and technicalities have taken precedents over the alleged merits in Federal court proceedings. (See e.g. Pet. at 8-11). Petitioners opine that Dallas prides itself as ". . . not part of the deep South" but that its ". . .culture and governance still reflect a lot of the prejudices and stereotypes of old;" and that litigation is expensive and cumbersome, and many parties choose to utilize arbitration to resolve their disputes. (Pet. at 9, 10-11).

These contentions and allegations, while they may very well be true, are unsupported by any citations whatever to the record and are simply not germaine to the considerations governing review on certiorari enunciated in SUP CT. R. 10. Petitioners point to no decision of a U.S. court of appeals, or of this Court, in conflict with this case; and presented no evidence that the decision in this case has departed from the usual course of judicial proceedings. Further, Petitioners have not shown that the resolution of this case reached by the jury and the district court, and affirmed by the Fifth Circuit, in any way raises a novel issue of Federal law to be decided by this Court. Instead, Petitioners inform us that Respondent ". . . cannot find shelter behind old, Supreme Court decisions." (Pet. at 12).

Petitioners make several allegations of improper procedure in the conduct of this case, but these claims are easily shown to be meritless upon examination. In the first place, Petitioners apparently contend that Respondent engaged in racially based exclusions to the jury venire during the trial of this cause. Petitioners ". . . from their visual observations claim that there was no black person left on the Jury. In the Record the Judge appeared to be in doubt. . ." (Pet. at 12). Turning to the record, trial counsel for Petitioners claimed that three out of four black members of the jury panel were struck. (Tr. at 41-42). Of these three persons, one was in fact struck *by Petitioners*. Respondent advanced race-neutral explanations concerning its strikes, which were credited by the district court. (Tr. at 42-43). Petitioners offered no evidence that the reasons advanced by Respondent were pretextual or that Respondent acted based on any improper motive.[4] Consequently, the preemptory challenges pass muster under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986); *see also Great Plains Equip., Inc. v. Koch Gathering Sys., Inc.*, 45 F.3d 962, 965 (5th Cir. 1995) (holding that once challenged attorney explains strikes, other party must show that reasons given were pretextual or inadequate). Petitioners claims of racial discrimination in the jury selection are thus devoid of merit.

Petitioners further contend, *inter alia*, that ". . . the Jury telegraphed contempt for persons who sue" and that "[t]he Union lawyer, with great finesse, subtlety [sic] exploited race and the anti-litigious sentiment that was previously demonstrated" and that the Union ". . . not in exact words but by their actions portrayed the Plaintiffs in a stereotypical manner as black persons looking for a hand out and money grabbing blacks." (Pet. at 12-

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[4] One of the venirepersons in question was struck because he was a teacher and as such had appeal rights in the employment context. (Tr at. 43) The other venireperson was a union member with a grievance pending. (Tr. at 43). Such backgrounds were considered undesirable by Respondent's counsel in the context of a DFR proceeding. (Tr. at 43).

13). These are outrageous and utter falsehoods. Petitioners cite not *one iota* of evidence, from the record or otherwise, supporting these slurs on the jury, much less on counsel for Respondent, other then their own clearly self-interested accusations.

Petitioners, again without citation of evidence, chide Respondent for offering evidence regarding other litigation that Respondent itself had allegedly sought to exclude by a Motion in Limine. (Pet. at 15). However, no Order in Limine was actually approved by the district court, and, in any case, the trial record is devoid of objections by Petitioners to the introduction of any such evidence. Petitioners contend that Respondent ". . . deliberately attempted to hold the Petitioners out in a bad light. . ." (Pet. at 15). Judging from the tenor of the Petition, Petitioners are really contending that any attempt whatever by Respondent to present its version of the facts was prejudicial and inflamatory.

Petitioners further contend that Respondent's local counsel failed to follow ethical rules regarding his obligation ". . . to investigate between anticipated false evidence and past false evidence" (Pet. at 14). Respondent denies that any false evidence was presented—and Petitioners have nothing but their own conclusory allegations to say otherwise.

Finally, Petitioners allege that ". . . the Judicial System broke down in the Fifth Circuit" when Petitioner Watson's brief, and the accompanying appendix, on the sanctions portion of this case, was lost or disposed of by the Fifth Circuit's clerk. (Pet. at 19-20). However, Petitioners are unable to show any resulting harm—because a replacement brief was sent via facsimile to the Court of Appeals. (Pet. at 20). The appendix, which was not replaced, consisted of materials which were all in the court records—and the record was in the hands of the court of appeals. The "Judicial System" most certainly did *not* break down in the Fifth Circuit. The Fifth Circuit correctly upheld the disposition

of this case by the district court, and the Supreme Court should do the same by denying the petition for writ of certiorari.

II. THE COURT OF APPEALS CORRECTLY UPHELD THE DISTRICT COURT'S RULING GRANTING PARTIAL SUMMARY JUDGMENT WHICH FOUND THAT THE RESPONDENT DID NOT BREACH THE DUTY OF FAIR REPRESENTATION BY WITHDRAWING UNFAIR LABOR PRACTICE CHARGES INVOLVING PETITIONERS.

The Fifth Circuit correctly upheld the district court's finding that the Respondent did not breach the DFR by withdrawing ULP charges involving Petitioners. Petitioners alleged that the Union breached the DFR in two ways: first, by failing to represent them adequately in the NLRB investigation; and, second, by agreeing with Ashland not to appeal the NLRB's dismissal of their ULP charges. (2R. at 246, E.E.R at 606-07). The district court, in its Memorandum Opinion and Order—granted partial summary judgment to the Union—agreeing that the Union did not breach the DFR by withdrawing the ULP charges. (2R. at 249-53). However, the district court found that the Petitioners had raised an issue of fact as to whether the Union had satisfied the DFR with respect to its handling of the ULP charge investigation by the NLRB—and reserved that issue for trial. (2R. at 249). The district court's granting of partial summary judgment was correct, and should be upheld.[5]

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[5] Petitioners designate the Final Judgment in this case, entered on 9 March 1999—as a judgment to be reviewed in this case. (Pet. at 3). However, the Petition presents no argument bearing on the Final Judgment, so it is not further discussed here. A jury verdict—such as represented by the Final Judgment, should be reversed ". . . only if reasonable minds exercising impartial judgment could not have arrived at the verdict." *Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996), *cert. denied*, 519 U.S. 1055, 117 S.Ct. 682 (1997). Petitioners have not shown that reasonable minds could

It is well-settled that a union, such as Respondent, may only breach the DFR if its actions are either "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S.Ct. 903, 916 (1967). In 1991, this Court considered precisely the problem Petitioners complain of here, and found that the *Vaca* standard applies to ". . . all union activity, including contract negotiations. We further hold that a union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness.' . . . as to be irrational." *Air Line Pilots Ass'n. v. O'Neill*, 499 U.S. 65, 67, 111 S.Ct. 1127, 1128 (1991)(*citing Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686 (1953)). The district court's Memorandum Opinion and Order granting partial summary judgment relied heavily on *O'Neill*. (2R. at 249-253).

The situation in the matter at bar is precisely analogous to *O'Neill*. The Union was attempting to obtain its first CBA with Ashland, and was faced with a situation where it was forced between choosing to process the Petitioners' disputed ULP charges —charges which had already been found by the NLRB Regional Director to lack merit—and between a CBA for an entire bargaining unit. (E.E.R. at 632-43). As the district court clearly recognized, it was certainly "not illogical" for the Union's negotiators to choose to withdraw the charges, and accept the agreement—because getting the agreement had been the point of negotiations, and was in the best interests of the bargaining unit as a whole. (2R. at 252, E.E.R. at 630).[6] It is important to evaluate ". . . the rationality of a union's decision in light of both the

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not have arrived at the verdict reached in this case—so review of the jury's decision via a writ of certiorari should be denied.

[6] The district court correctly pointed out that the Union's agreement with Ashland involved the dismissal of *all* pending Unfair Labor Practice claims ". . . it did not single out Plaintiffs' charges as the only ones that would be withdrawn." (2R. at 252).

facts and the legal climate that confronted the negotiators at the time the decision was made." *Id.* at 78, 111 S.Ct. at 1136.

In May of 1995, the Union negotiators knew that they were faced with an Ashland contract proposal acceptable to most of their membership, at the price of some ULP charges that had already been found meritless. It was certainly within the "wide range of reasonableness" allowed by *O'Neill* for the Union to decide to accept Ashland's proposal, and to forbear from appealing the NLRB ULP charges. As this Court clearly appreciated in *O'Neill*, such compromises are inherent in the nature of collective bargaining and negotiating. "A bad settlement may be more advantageous in the long run than a good lawsuit." *Id.* at 81, 111 S.Ct. at 1137. As the district court recognized, "[i]n reaching a labor agreement, it is impossible for the union to satisfy completely each of its members; some give and take is inevitable." (2R. at 252). Clearly, under the analysis set out in *O'Neill*, as applied by the district court, summary judgment in the Union's favor on the issue of whether the Union had breached the DFR by withdrawing the ULP charges involving Petitioners was correct. The Fifth Circuit was thus correct when it upheld the district court's partial summary judgment.

III. THE DEFAULT JUDGMENT IN THIS MATTER WAS CORRECTLY SET ASIDE, BECAUSE SERVICE OF PROCESS ON THE UNION WAS NOT ACCOMPLISHED.

Petitioners contend that a Default Judgment in this matter was wrongfully set aside by the district court, and that the Respondent "deliberately flaunted and circumvented State law [pertaining to service of process] with impunity." (Pet. at i, 21). The record is devoid of evidence supporting these assertions.

A. The Union Showed Good Cause to Set Aside the Default Judgment Because Service of Process Was Not Properly Effected.

FED. R. CIV. P. 4 provides that service pursuant to ". . . the law of the state in which the district court is located" is suffi-

cient to give the District Court jurisdiction. As will be seen, Petitioners did not obtain valid service under Texas law, and the default judgment was thus void. "A default judgment entered where there has been no proper service of the complaint is *a fortiori*, void, and should be set aside." *Gold Kist. Inc. v. Laurinburg Oil Co., Inc.*, 756 F.2d 14, 19 (3rd Cir. 1985); *See also Petrucelli v. Bohringer & Ratzinger GmBH Ausdereitungsanlagen*, 46 F.3d 1298, 1304 (3rd Cir. 1995) (holding that defects in the service of process render a judgment void).[7]

Petitioners' Original Complaint correctly recognized that the Union is an "unincorporated association." (1R at 002). Under Texas law, service on unincorporated associations can be had, firstly, by serving the president, secretary, treasurer or general agent of the unincorporated association. TEX. REV. CIV. STAT. ANN. art. 6134 (Vernon 1970); *see also Otto Vehle & Reserve Law Officers v. Brenner*, 590 S.W.2d 147, 153 (Tex. Civ. App.—San Antonio 1979, no writ). Also, unincorporated associations may be served by serving an agent or clerk employed in the unincorporated association's "office, place of business or agency" if it maintains such a facility within the State. TEX. CIV. PRAC. & REM. CODE. ANN. § 17.021 (Vernon 1997) ("Section 17.021").[8]

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[7] In *Petrucelli*, as in the matter at bar, the person served with process was not the Defendant's authorized agent. *Petrucelli*, 46 F.3d at 1304.

[8] In fact, the Union does maintain an office within the State—in the Houston area, at Webster, Texas, which has been located there since 1992. (1R at 140-41). The Union's headquarters are located in Lakewood, Colorado. (1R at 141). Local 4-208, not a party to the suit, maintains an office at 15001 Trinity Boulevard in Fort Worth, Texas. (1R at 141). The Summons was served at none of these locations. (1R at 112-13). Moreover, Petitioners were in possession of correspondence from Union President Wages which provided the names of Union officers and the Union's address on the Union's letterhead. (1R at 085).

Petitioners are evidently outraged that Respondent ". . . refus. . .[ed] to designate an agent for service of process." (Pet. at i). As Petitioners recognized, Respondent is an unincorporated association, and not a corporation—and Petitioners have provided no support whatever for the proposition that unincorporated associations are required to appoint registered agents or that it is against "public policy" for them not to do so.

As will be shown, to be an "agent" for service of process, the "agent" must have authority to receive service. In the matter at bar, the Summons was directed to "Michael T. Johnson or Donshea Bowman, Representative/Agent" of the Respondent. (1R at 112-13) The Complaint makes no reference to either Johnson or Bowman—other than the bald, unsupported assertion that they are agents of the Respondent. (1R at 001-06). Under Texas law, service on an agent is *not* sufficient to effect service on the principal unless the Defendant to be served *expressly authorized* an agent to receive process. *H.L. McRae Co. v. Hooker Const. Co.*, 579 S.W.2d 62, 64 (Tex. Civ. App.—Austin 1979, no writ).[9] "A naked allegation of agency alone will not support rendition of a default judgment." *Encore Builders v. Wells*, 636 S.W.2d 722, 723 (Tex. App.—Corpus Christi 1982, no writ), (*citing White Motor Co. v. Loden*, 373 S.W.2d 863 (Tex. Civ. App.—Dallas 1963, no writ)).

Ashley Forest Apts. (Lindsay Enterprises) v. Almy, 763 S.W.2d 293 (Tex. App.—Houston [14th Dist.] 1988, no writ) construes Section 17.021, and is precisely on point. In *Ashley*, plaintiffs had served an apartment complex owner by serving its

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[9] According to Respondent's President, Robert Wages, Michael T. Johnson ". . .is not and has never been an authorized agent. . ." of the Union. (1R at 039-040). Moreover, under Article I, §5 of the Union's Constitution and Bylaws, only individuals authorised in a writing signed by an appropriate official designated to so act may act as an agent for the OCAW, or any chartered or subordinate body of the OCAW. (1R at 120).

manager, located at the apartment complex. *Id.* at 294. Like Petitioners here, the *Ashley* plaintiff contended that service on the manager was valid under Section 17.021. *Id.* at 295. The *Ashley* court found that service was **not** valid under Section 17.021, because there was no affirmative showing that the "agent" was in fact an agent for service of process. See *id.* at 295-96.

Moreover, ". . . whether the person served was in fact the agent for service of process must ***be affirmatively established by evidence before a default judgment can be sustained. The pleadings, recitals in the citation, and statements contained in the officer's return are not, in themselves alone, sufficient to establish this requirement.***" *Hanover Modular Homes of Taft, Inc. v. Corpus Christi Bank & Trust*, 476 S.W.2d 97, 99 (Tex. Civ. App.—Corpus Christi 1972, no writ) (emphasis supplied). "A party relying on service upon an agent has the burden of proving existence of the agency relationship; it cannot be presumed." *Anderson v. Clajon Gas Co.*, 677 S.W.2d-702, 704 (Tex. App.—Houston [1st Dist.] 1984, no writ), (*citing Buchoz v. Klein*, 143 Tex. 284, 184 S.W.2d 271 (1944)).[10]

In this case, the return of service recites that the Summons and Complaint were served on Michael T. Johnson. (1R at 112-13). There is no finding on the face of the Default Judgment that Michael T. Johnson is a valid agent for service of process on the Respondent; no finding in the Default Judgment that the Respondent had appointed Michael T. Johnson its agent for service

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[10] Petitioners attempted below to use the Declarations of Floyd Moss and Michael Johnson to establish that Michael Johnson was an agent of Defendant. However, as the magistrate judge recognized, nothing in these declarations showed that Michael Johnson was a proper agent for service under Section 17.021. (1R at 158). As the magistrate commented: "Mr. Johnson's lack of knowledge that Defendant maintained an office in the State of Texas, standing alone, calls into serious question his capacity as an agent for service of process." (2R at 184). Further, as shown, the question of whether the person served was in fact a valid agent for service of process must be shown **before** a default judgment can be entered.

of process. (1R at 027-28). Consequently, as stated above, it cannot be shown that the Petitioners affirmatively established that Michael T. Johnson was the proper agent for service of process on the Respondent. Since Respondent was not properly served with summons and complaint, the district court lacked *in personam* jurisdiction over Respondent when it entered the Default Judgment, and that judgment was therefore void and correctly set aside. FED. R. CIV. P. 60(b)(4).

B. Federal Law Does Not Support Petitioners' Default Judgment.

Petitioners incorrectly contend that Federal law (29 U.S.C. § 185) supports their attempts to accomplish service of process in this matter. (Pet. at i). However, this statute is inapplicable in the matter at bar. In *Chapman v. Local 104, Int'l. Assn. of Machinists*, 199 F. Supp. 186 (S.D.W.V. 1961), the plaintiffs in that case, attempting to serve Local 104 of the Machinists Union with process, served one Childers, the chairman of the shop committee at the plaintiffs place of employment. *Id.* at 191. The court found that Section 185(d) was inapplicable, because under the terms of 29 U.S.C. § 185(a), Section 185(d) only applied to suits between employers and labor organizations, and that the plaintiffs, as individuals, could not utilize Section 185(d). *Id.* Interestingly, the Court also found that Childers could not be served under FED. R. CIV. P. 4 as an agent of Local 104, since his only duty was to process grievances on behalf of those who worked in his shop. *See id.* Similarly, Michael Johnson, the person served by Petitioners in this matter, was a rank-and-file *Ashland* employee who happened to be a Union negotiating committee member, and not an employee, officer or agent of Respondent. (1R at 045-46). In any case, Petitioners' service of process in this matter cannot be supported by Section 185.

IV. THE PETITION SHOULD BE DENIED BECAUSE THE SANCTIONS ASSESSED WERE JUSTIFIED IN THIS CASE.

Petitioner Watson contends that she was ". . .wrongfully and unfairly sanctioned when. . . she reported to the Court what she was legally, ethically and morally obligated to do." (Pet. at 17). As will be shown, this is a gross mischaracterization of the circumstances surrounding the sanctions which were quite properly assessed in this case.

A. The Rule 60 Motion.

The Petition for Review, like the briefs filed in the Court of Appeals is, for the most part, conspicuously silent on the document which occasioned the Motion for Sanctions—namely the Petitioners' "Rule 60 Motion and Brief for Relief Under Final Judgment" ("the Rule 60 Motion") filed on 7 April 1999, by Petitioner Watson, after Petitioners lost at trial.

This silence by Petitioners—specifically Petitioner Watson —is itself a comment on the bankruptcy of the Rule 60 Motion. The Rule 60 Motion was denied by the district court because it was:

> . . . premised on unfounded, baseless, and ridiculous personal attacks on. . . [counsel for the Union]. The Court further finds that the allegations in the Rule 60 Motion accusing the Defendant and its attorneys of engaging in a conspiracy to commit fraud on the Court and to suborn perjury are baseless. The Court also finds that Plaintiffs' groundless attacks continued in their Response to Defendant's Motion for Sanctions and in open court today.

(Order on Motion for Sanctions, S.R. at 0001)

The Rule 60 Motion primarily concerned three sets of allegations by the Petitioners: an assertion that Respondent's principal witness, John Dykes—lied on the witness stand; an accusation that Respondent's counsel engaged in race-bating; and

charges that Respondent's counsel suborned perjury. All of these accusations were correctly found by the district court to be outrageous and false.

1. Accusations of Perjury.

The Rule 60 Motion alleged, *inter alia*, that Respondent's principal witness at trial, John Dykes ". . . lied on a crucial issue. . ." (3R. at 382). Evidently, this lie consisted of Mr. Dykes ". . .perjur. . .[ing] himself by non disclosures" by ". . . not reveal[ing]. . . that Counsel. . . knew that to get a collective bargaining Agreement with Ashland, [that] John Dykes was undermined and replaced by Jimmy Roan, AND THAT JOHN DYKES CEASED TO COMMUNICATE WITH MS. WATSON DURING THAT CRITICAL PERIOD OF TIME." (3R. at 383)(emphasis in the original). Dykes is also alleged to have given ". . . false testimony to cover for the Union's sell out of the Plaintiffs." (3R. at 383); and to have ". . . assured Ms. Watson that Mr. Gregory Mooney, OCAW's General Counsel, would file the Appeal [to the NLRB] timely for Plaintiffs." (3R. at 383).

These allegations are nonsensical. (3R. at 383). Under 18 U.S.C. § 1621, perjury occurs where a witness, under oath ". . . states or subscribes any material matter which he does not believe to be true." Even assuming Petitioners are correct about the nature of Dykes alleged non-disclosures, Dykes could not commit perjury by "non disclosures"—particularly where Dykes *was never asked about these matters during trial.* Since Dykes was never asked these questions, he could not have lied, much less perjured himself.

2. Petitioners' Unfounded Allegations Of Race-Baiting.

Further, Petitioners Rule 60 Motion accused the Union of "adeptly play. . . [ing] to the Jury the traditional stereotypes of black people as persons looking for a hand-out from everyone" and as mischaracterizating the Petitioners to the jury as "'sue

happy', 'money grabbing blacks.'" (3R. at. 383, 385) Petitioners denounced these alleged actions as "a travesty of justice and a fraud on the Court." (3R. at 385). In fact, it is these allegations which were and are—a travesty. The Petitioners cited no evidentiary support for these outrageous accusations whatever, and there is no indication in the record that such arguments were in fact made to the jury. Petitioner Watson, was present for the entire trial, and knew or should have known full well that no such pejorative terms were ever uttered, by Respondent's witness, by any representative of Respondent, or Respondent's counsel. Petitioners presented no evidence whatever—in response to the Union's Motion for Sanctions—to support these specious allegations. As mandated by FED. R. CIV. P. 11, Petitioners were offered 21 days to withdraw the offending Rule 60 Motion. (3R. at 508, 515-16, 527). Petitioners refused. In such circumstances, sanctions may be imposed. *O'Brien v. Alexander*, 101 F.3d 1479, 1489 (2nd Cir. 1996).

3. Unfounded Accusation that Respondent's Counsel Presented False Evidence.

Petitioners' Rule 60 Motion stated, in pertinent part:

> . . . in order to set aside a judgment or order because of "fraud on the court", it is necessary to show an unconscionable plan or scheme which is designed to improper [sic] influence the jury in his [sic] decision. In the instant case the egregious test is met. This scheme and plan was perpetrated by Counsel . . . [for Respondent] . . . when to the Jury he blamed everyone but the Union for wrongs done and mistreatment of Plaintiffs, but he went to [sic] far, when he encouraged false testimony relating to the communications between John Dyke [sic] and Joseph Williams Attorney.

(3R. at 385) (quotation marks in original).

Petitioners had no grounds whatever to accuse the attorney for the Union of an unconscionable plan or scheme to improp-

erly influence the jury. If Petitioners had objections to Respondent's counsel's jury arguments, then they should have lodged them at trial, when the allegedly objectionable statements were made. *Fleming v. Harris*, 39 F.3d 905, 908 (8th Cir. 1994). However, Petitioners lodged no such objections. They have no evidence whatever of any "scheme" to improperly influence the jury. In any event, relief under FED. R. CIV. P. 60—as sought by Plaintiff—requires *proof* of misconduct or fraud by *clear and convincing evidence*. *Government Fin. Servs. v. Peyton Place, Inc.*, 62 F.3d 767, 771 (5th Cir. 1995). No evidence whatever has been produced here.

B. Sanctions were Warranted.

As shown above, all of the allegations presented in Petitioners' Rule 60 Motion were completely false and unfounded. Moreover, both Petitioners, and their counsel on appeal, Petitioner Watson, who were all present during the entire trial, had reason to know that these accusations were completely false and unfounded, thus rendering Petitioners Rule 60 Motion frivolous and sanctionable, as defined under FED. R. CIV. P. 11. Pursuant to FED. R. CIV. P. 11(c)(1)(A), Petitioners were given twenty-one-days notice of Respondent's intention to file the Motion for Sanctions. (3R. at 508, 515-16, 527).

Petitioners did not withdraw their Rule 60 Motion, nor produce *any* evidence supporting their Rule 60 motion going beyond the conclusions and opinions of Petitioners. The shrill tenor of Petitioners' Rule 60 Motion clearly shows that Petitioners were really contending that any effort of Respondent to present its version of the facts was itself an improper effort to influence the jury.

Petitioner Watson complains of her treatment by Judge Buchmeyer, that she was "subjected to . . . abusive behavior, interrputions, screaming" and that Judge Buchmeyer's "judicial rage was unjudicial." (Petition at 17). Respondent disputes this characterization of Judge Buchmeyer's deportment, and given

the scurillous content of Petitioner Watson's Rule 60 Motion, Respondent believes that Judge Buchmeyer's conduct was entirely appropriate. In any event, Petitioners' complaints about the sanctions hearing—which consume the bulk of the Sanctions Brief—are insufficient to show any abuse of discretion, especially in light of the unsupported allegations in the Rule 60 Motion.

As the district court correctly stated:

> The only abuse of the judicial process this Court has observed has been by Ms. Watson as she has carelessly strewn about extremely serious and completely groundless allegations of racism, perjury and conspiracy to commit fraud on the Court as casually as if she were discussing the weather. It is a travesty of justice that Ms. Watson would even consider voicing accusations with the potential to have such a damaging impact on others with absolutely no evidence to back them up. To continue to make these same allegations after it was clearly demonstrated in open court that they had absolutely no basis in fact is inexcusable.

(S.R. at 0007).

Clearly, the district judge, confronted with the patently false allegations contained in Petitioners' Rule 60 Motion—did not abuse his discretion in imposing sanctions. Respondent respectfully suggests that the Fifth Circuit was correct when it upheld Judge Buchmeyer's Order on the Motion for Sanctions. Likewise, the petition here should be denied

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

PATRICK M. FLYNN
1235 North Loop West, Suite 1235
Houston, Texas 77008
(713) 861-6163
Counsel of Record for Respondent
Oil, Chemical & Atomic Workers
International Union, AFL-CIO

August 9, 2000